

Mr Pherson

AUGUST 3d, 1762.

[To be reported by Lord ELIOCK.]

MEMORIAL

*Competency of a Plea of a Verdict of a Jury
FOR fixing the Sheriff's fiars*

JAMES HOTCHKISS, JOHN HUNTER and
others, Brewers in Edinburgh, Pur-
suers;

AGAINST

JAMES M'PHERSON and others,
Defenders.

THAT we have purchased large quantities of barley, of
crop 1761, to the extent of many thousand bolls.

Our bargain with the gentlemen and farmers, who sold
those parcels of barley, was, That the price should be de-
termined by the sheriff-fiars of Mid-Lothian, to be struck
for the said year 1761.

The sheriff of Edinburgh summon'd eight landed gentle-
men, and seven persons, in the condition of traders, or dealers,
to compose the jury for striking the fiars of the said year.

Some of those gentlemen are very respectable, both in
point

point of character and fortune ; we have due respect for them all. But the memorialists, finding themselves aggrieved by their proceedings in this matter; have sought relief from your Lordships, and insisted in an action, which came in course before the Lord Eliock, for reduction of their verdict, as being neither regular in form, nor just in matter.

This jury was assembled on the 9th of March, 1761; and, by their verdict, *inter alia*, they fixed the price of the best barley, crop 1761, at half a guinea *per* boll.

By the act of sederunt 21st December, 1723, ‘ The
 ‘ Lords considering, that the use of the sheriff-fiars is to li-
 ‘ quidate the price of victual, in diverse processes that come
 ‘ before them and the subordinate judicatures; and that there
 ‘ is a general complaint, That the said fiars are struck and
 ‘ given out by the sheriffs, without *due care and enquiry into*
 ‘ *the current and just prices*; and that, when some sheriffs
 ‘ proceed in striking the fiars, by way of inquest, *yet they get*
 ‘ *not sufficient evidence to the jury*.—Therefore, the saids
 ‘ Lords do appoint and require the sheriffs of Scotland, and
 ‘ their deputes, yearly, *betwixt the 4th and 20th of Febru-*
 ‘ *ary, to summon, before them, a competent number of persons*, li-
 ‘ ving within the sheriffdom, who have knowledge and ex-
 ‘ perience of the prices, and trade of victual, in these bounds;
 ‘ and, from them, to choose 15 men, whereof, not fewer
 ‘ *than eight* shall be heritors, to pass upon the inquest, and
 ‘ return their verdict on the evidence under written, or their
 ‘ own proper knowledge, concerning the fiars. —And the
 ‘ said sheriffs, *shall, to the same time and place, summon the*
 ‘ *propereft witnesses, and adduce them*, and all other good evi-
 ‘ dence, concerning the price at which the several sorts of
 ‘ victual have been bought and sold, especially since the first
 ‘ of November, immediately preceeding, until that day;
 ‘ and also, concerning all other good grounds or arguments,
 ‘ from whence it may rationally be concluded, by men of
 ‘ skill and experience, what ought to be established, as the
 ‘ just



‘just fair-prices, for the said crop.—And any persons, then present, may, in open court, and no otherways, and observing due order and respect, *offer information* to the jury concerning the premises, and *concerning the evi^ou^oce adduced, or that might be adduced* before them, &c.’ One observation will naturally occur to your Lordships, in considering this act of sederunt, that not less than *eight* heritors are appointed to be upon the jury; by which, in effect, the whole determination of the matter, is thrown into their hands. Of the remaining seven, *three* only, by the practice, are brewers, the other *four* are dealers in grain.

In forming the verdict complained of, the purpose of this act of sederunt was counter-acted in every material point, and the verdict will appear to be void, upon the principles of common law, in this and every other civilized country.

The act of sederunt, directs and determines a proper time and season of the year, for ascertaining the fair-prices, that it shall be in the month of February, yet this jury was not convened until the month of March.

The act of sederunt clearly and expressly directs: That the jury are not to determine by their own arbitrary will, or even solely upon their own knowledge. — They are to make enquiries, and examine witnesses; and they are to receive any proper and pertinent information, which is offered in open court; and their proper knowledge is only to be resorted to, if the other evidences prove insufficient; yet in this case, they examined no witnesses, and refused to receive information, properly offered, in open court. — For John Hay brewer, one of the jury, offered to prove, that no barley had been bought above 10*s.* *per* boll, and that he himself, had bought part of his barley at 8*s.* 6*d.* and 9*s.*; but the landed men of the jury disregarded this offer of proper evidence, and arbitrarily fixed the price at half a guinea.

By the common practice throughout the kingdom, founded in reason, and the plain sense of the act of sederunt, the fairs must

must be struck at a reasonable medium, between the highest and lowest current prices ; and so Lord Bankton says, vol. 2 d. p. 558. ‘ That the fiars are commonly struck of the middle kind, neither at the highest or lowest rates ; ’ yet in this case, the over-ruling landed men of the jury, struck the fiar-price of barley at a higher rate than had been given in any instance ; which is strongly confirmed by this, that the fiar price of this same year for East Lothian, was afterwards struck at 9s. 1d. *per* boll, tho’ the barley of East Lothian be known to be of as good, if not better quality than that of Mid Lothian.

By the principles of common law, in this and every country, it is an essential maxim, in the administration of justice, which never can admit of a doubt or exception, That a party interested in a matter to be determined, cannot lawfully judge. — In this case, the landed gentlemen had sold their grain by the fiars, and were interested to make the price high — These gentlemen, can have no just cause to complain, that their verdict or judgement is challenged, on a reason which is good against all judges. — Even your Lordships, the supreme judges, and least suspected, are liable to this objection, and decline yourselves where it occurs. — The verdict is therefore void and null, upon this single ground.

The defenders, conscious of the force of these objections, thought proper to plead a declinator of your Lordships jurisdiction, and maintain, that it is not competent for the pursuers, to insist in a reduction of the verdict. The Lord Ordinary made *avizandum* to your Lordships, and ordered memorials on this preliminary point of the competency of this action, for reduction of the fiars before your Lordships. And a few observations shall be offered, as the pursuers are advised, that this point will appear, to be abundantly clear in their favours.

The pursuers apprehend, it is an established point, that, by the constitution of your Lordships authority, confirmed by invariable practice, you are not only the supreme judges, but the supreme jury, in all matters of civil right or jurisdiction.

Various civil rights are determined by the verdict of juries, yet your Lordships have a power to review and reduce their ver-

verdicts; and this power is daily exercised.—The brief of Mortancestry, the brief of Idiotry, the brief of Perambulation, the brief for kenning of widows terce, are all tried by juries, and the rights, thereby claimed, are ascertained by verdicts; yet it cannot be disputed, that your Lordships, as the grand and supreme jury of the nation, have power, and competent jurisdiction, to alter and reduce such verdicts, at the instance of any party, who can show a proper interest to challenge them.

The defenders council could not controvert the competency of your Lordships jurisdiction, in these various cases, to reduce verdicts in matters of civil interest; but they were pleased to make distinctions, where there is no difference.—They objected, 1. That the pursuers were no parties to this verdict; and therefore can have no proper interest to reduce it.—To which it is answered, That this is a mere nicety.—Where there is a manifest wrong, there must be a remedy.—The pursuers qualify, that they are wronged by this verdict, and thereby they have a proper and just interest to reduce it.—In the same manner, that a nearer heir, offering to prove his propinquity, would be entitled to reduce a service, in which he had not been called as a party.—Or a proprietor, who had not been called in the brief of Perambulation, might reduce a verdict, if he can show lesion or incroachment on his property.

2dly, It was objected, That this reduction cannot take place; because it would go much farther than the pursuers interest, and would, in effect, overturn many other bargains, which have been made with reference to the fiars, and affect a variety of other interests, which are not in the field.—To which it is answered, That every party has a right to complain and seek redress, in so far as, he is injured or agrieved; nor can this right be hurt by the silence of others, who may have the same ground of complaint.—In a submission by fifty different parties, it is undoubted, that any one may obtain

reduction of the decreet arbitral, upon just grounds. — The pursuers only seek redress, in so far as they are aggrieved; and it seems impossible to controvert, that if the fiars have not been legally struck, which, in this argument, we are entitled to take for granted, the fiars cannot be made the rule for determining their bargains with the defenders, from whom they purchased at the fiar-prices. — If the sheriff had, without calling a jury at all, or observing any of the directions of the act of sederunt, arbitrarily fixed the fiars, by his own authority singly, it cannot be disputed, that the pursuers would have been entitled to reduce this act of the sheriff, as illegal in itself, and unjust to them. — The case is truly the same. — The most essential directions of the act of sederunt have been neglected, or over-ruled, and an interested jury is more exceptionable, than a determination without jury altogether.

Your Lordships jurisdiction, therefore, to reduce this verdict, at least, in so far as the pursuers have suffered a wrong by it, seems to be founded in the clearest principles of law and justice; and this is confirmed by an express decision of the court, which will give your Lordships full satisfaction. — It is quoted in the dictionary, *Tit. Jurisdiction*, p. 500. — December 1725, *Lewars contra* Earl of Haddington and his deputed. — And is thus reported, in the dictionary; — ‘ In a reduction of the fiars of East-Lothian, *imo*, Because of their exorbitancy. *2do*, Because not struck by a jury impannelled, according to the prescription of the act of sederunt 21st December 1723. It was objected, There is no reduction competent, in the nature of the thing, of sheriff-fiars, which are nothing else but a return made by the sheriff, as the King’s officer, into the King’s court of Exchequer, of what he finds to be the reasonable price for grain that year; which is not matter of jurisdiction at all, to be subject to the review of a superior court. The Lords, notwithstanding, found this matter subject to a review, and sustained themselves judges.’

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This is a decision in point. — Tho' the Collector observes, that, ' Formerly, the Lords had found this matter not subject to their review, Forbes, 18th June 1712, Brewers, supplicants, *contra* sheriff of Edinburgh.' — Yet your Lordships will easily observe a solid ground for the difference in these two decisions. — Before the act of federunt 1723, the fiars were only considered as a report of the sheriff to the King's court, bearing the current prices, by which the King's rents were to be settled and levied ; but by this act of federunt, the fiars became a new creature, created by the court not only to determine the King's rents, but the properties and bargains of private subjects ; and, since the 1723, have been much more generally referred to, by private people, in making bargains. They must therefore naturally and necessarily, be subject to the review and conviction of the court, if wrong has been done under their authority ; or if the proper rules and directions, laid down by the court, have not been duly observed. Nay it will be competent, and proper, for your Lordships to establish other rules for striking these fiars, in order to put them still upon a more equitable footing.

In respect whereof, &c.

FRA. GARDEN.



IR. G. C. 111